

**LIJAH BINTE MAHMUD v. COMMISSIONER
OF LANDS AND MINES, TRENGGANU
& ANOR.**

[O.C.J. (Raja Azlan Shah J.) August 24, 1966]

[Kuala Trengganu — Originating Motion No. 3 of 1965]

Administrative Law — Certiorari — Order of commissioners of lands and mines — Error of law — Harta sapencharian — Trengganu Land Enactment, 1357, s. 60.

This was an application to quash the order of the commissioner of lands and mines. The applicant was married to the second respondent for about ten years. During the marriage the second respondent acquired a piece of jungle land and the applicant assisted the second respondent in felling the jungle and planting rubber trees. The parties were divorced and the applicant claimed a half share in the property as *harta sapencharian*. The claim came before the collector of land revenue under section 60 of the Trengganu Land Enactment and the collector awarded her a half-share in the property. The second respondent appealed to the commissioner, who, after hearing further evidence, set aside the order of the collector. The commissioner based his decision on two grounds firstly that the land was acquired and paid for from the second respondent's savings and secondly that the applicant was never at any time forced or asked by the second respondent to assist him in planting the rubber.

Held: (1) on an appeal from an order of the collector, the commissioner is not permitted to take further evidence; but although the commissioner did so in this case this was a procedural defect which did not go to jurisdiction but merely afforded a ground for appeal;

(2) in the absence of evidence to the contrary the land was *harta sapencharian*, to which the applicant was entitled to a half-share, and therefore the order of the commissioner was wrong in law on the face of the record and should be quashed.

Cases referred to:—

- (1) *Martin v. Mackonochie* (1879), 4 Q.B.D. 697.
- (2) *Roberts v. Ummi Kalthom* [1966] 1 M.L.J. 163.
- (3) *Habsah binte Mat v. Abdullah bin Jasoh* [1950] M.L.J. 60.
- (4) *Rez v. Northumberland Corporation Appeal Tribunal, ex parte Shaw* [1952] 1 K.B. 338.
- (5) *Rez v. Northumberland Corporation Appeal Tribunal, ex parte Shaw* [1951] 1 K.B. 711 at p. 722.
- (6) *Walsall Overseas v. London and North Western Rly. Co.* (1878), 4 App. Cas. 30, 39.
- (7) *Rez v. Nat Bell Liquors Ltd.* [1922] 2 A.C. 128.

MOTION FOR ORDER OF CERTIORARI.

A. *Wilson* for the applicant.

Dato' Abdullah for the respondents.

Cur. Adv. Vult.

Raja Azlan Shah J.: This is an application for an order of *certiorari* to quash an order made by the Commissioner of Lands & Mines, Trengganu, reversing the order of the Collector of Land Revenue, Kuala Trengganu. The circumstances leading to the application are as follows.

The applicant was married to the second respondent for some ten years. During the

coverture of the marriage the second respondent acquired a piece of land AA. 457/55 which was then jungle land. The applicant assisted the second respondent in felling the jungle and planting rubber trees. The parties divorced, and the applicant claimed a half share in the property as *harta sapencharian*. The claim came before the collector under section 60 of the Trengganu Land Enactment No. 3 of 1357. The collector heard evidence on behalf of the applicant and her four witnesses who, if believed, seemed to support her claim. The second respondent gave evidence but no witnesses were called. The collector adjudicated upon the matter and in due course came to the conclusion that the applicant's claim was well founded and accordingly awarded her a half share in the property. The second respondent, being dissatisfied with the collector's decision, appealed to the commissioner under section 138(i) of the Land Enactment. The appeal eventually came before the commissioner. He recorded further evidence from both the second respondent and the applicant and in due course gave judgment for the second respondent and set aside the order of the collector. He based his decision on two grounds: firstly, that the land was acquired and paid for from the second respondent's savings, and secondly, that the applicant was never at any time forced or asked by the second respondent to assist him in planting the rubber. The commissioner concluded that the applicant assisted her husband voluntarily. The applicant was dissatisfied with the decision, and it is in those circumstances that the application came before this court.

The application dealt with three matters. Firstly, it was alleged that the commissioner had acted in contravention of the rules of natural justice; secondly, that he had acted in excess of his jurisdiction; and finally, there was an error of law on the face of the record. In my view the first ground does not avail the applicant. A fair consideration of the record established beyond doubt that the rules of natural justice were not denied to the applicant. With regard to the second ground, two considerations arise i.e. whether the provisions of section 138(i) of the Enactment permit the taking of further evidence, and if so, whether it amounts to a procedural defect which goes to jurisdiction. I shall content myself with the proposition that the power given to an authority under a statute is limited to the four corners of the statute. It is therefore pertinent to consider the relevant provisions of the Enactment. Section 60 is the provision of law under which the collector heard the application at first instance. It is divided into twelve sub-sections. Sub-section (i) deals with the cause of action; sub-section (ii) deals with service of notice; sub-section (iii) deals with the procedure to be adopted at the hearing. Sub-section (iii).

"on the day and at the time and place fixed for hearing the collector shall proceed to hear the application in the presence of both the parties and shall record the evidence in writing and may thereafter make such further enquiry as he shall think fit."

The collector has power to adjourn the case from time to time. Sub-section (vi) deals with the decision and order of the collector. Chapter XV of the Enactment deals with appeals and appearances before the commissioner. It consists of two sections. Section 138 is divided into four sub-sections. Sub-section (i) is the relevant sub-section for present purposes and I will quote it in full:

"Any party dissatisfied with any decision made by a collector as registrar or otherwise in matters arising under this Enactment may, if no other appeal is specially prescribed and unless it is prescribed that the decision of the collector is final, appeal to the commissioner within a period of one month from the date of such decision and on payment of the prescribed fee, and the decision of the commissioner shall be final."

Sub-section (ii) gives any party dissatisfied with the decision of the commissioner the right of appeal to the Supreme Court within a stipulated time. Sub-sections (iii) and (iv) are not relevant for our present consideration. Section 139 deals with appearances before the commissioner. It is to be observed that whereas section 60 gives an exhaustive description of the steps to be taken when hearing appeals before the collector, section 138(i) does not specify in express terms the procedure for hearing appeals from an order of the collector. In the absence of such express provisions I must interpret the provision of section 138(i) as stipulated in the sub-section itself. A careful analysis of the section leads me to the inescapable conclusion that a commissioner is not permitted to take further evidence on an appeal from the order of the collector. I do not think that it is open to any other interpretation. So to read the section appears to me to read into it a great deal that is not there. That being the case, what is the result? Counsel for the applicant argued that non-observance of the steps envisaged in the section goes to jurisdiction. I venture to express the view that non-observance of the requirements of the section constitutes a procedural defect occurring during the hearing and such procedural defect is not an error going to jurisdiction but remediable only by way of appeal. To hold otherwise would be to assert that although a tribunal had jurisdiction at the outset a subsequent error in procedure relates back to the start and makes the whole proceeding in excess of jurisdiction. Whatever may be the true reason for it, there is ample authority to justify me in concluding that procedural defect in the course of the hearing does not go to jurisdiction but merely affords a ground of appeal. *Martin v. Mackonochie* ⁽¹⁾ is the authority for the above proposition. Cotton L.J. at p. 735 said as follows:

"But the general rule is clear, that if the court of

A limited jurisdiction, in dealing with a matter over which it has jurisdiction, has fallen into an error of practice or of the law which it administers, this can only be set right by appeal, and offers no ground for prohibition."

And Lord Coleridge C.J. at p. 788 said as follows:

B "... but I think they establish this, that where the subject-matter is for the court Christian, and where the act done is something which in itself the court Christian can do, the steps by which the court arrives at the act, however erroneous they may be, are matters of appeal and not ground of prohibition."

C I now come to the final ground. The question that is to be posed is whether the High Court can interfere and correct the decision of the commissioner if it is erroneous in point of law. That involves a prior consideration whether the commissioner's decision was wrong in law. As stated earlier, the commissioner arrived at his decision on the basis that the applicant had worked the land voluntarily, and I quote his reasoning:

D "During the period of the appellant and the respondent living as husband and wife the respondent did not at any time ask the appellant as to the ownership of the land when it was first alienated to the appellant nor did the respondent ask the appellant as to whether by assisting the appellant in planting rubber on the land should be jointly held by them as registered co-proprietors of the land.

E "The question in issue in this case is that whether a wife by doing something for or giving assistance voluntarily to a husband is entitled to a share of the land. It is my conviction that it is customary for a wife to assist a husband in the hope that they can settle down peacefully during their stay as wife and husband not of course in expectation of sometime (*sic.*) to be given to the wife when divorced except matters governed by the religious principles.

F "As such the appeal is allowed and the order made by the Collector of Land Revenue, Kuala Trengganu, is hereby quashed."

G In my opinion the commissioner was clearly wrong in his application of the law to the facts before him. It is not denied and in fact his decision is based on the established fact which he had accepted from the findings of the collector that the applicant did assist the second respondent in felling and clearing the jungle and planting the land with rubber. Now, the position of a divorced Muslim spouse relating to property acquired during the coverture of marriage is, I hope, sufficiently dealt with in my judgment in the case of *Roberts v. Ummi Kalthom*, ⁽²⁾ and I do not wish to add anything more to what I have said there. Broadly speaking, once it is clearly established that property was acquired subsequent to the marriage out of joint resources or efforts, a presumption arises that the property is *harta sapencharian* and the presumption can only be rebutted by evidence such as that the property was acquired by the sole efforts or resources of the husband. The onus is on the husband to rebut the presumption. In the present case it is beyond controversy that the second respondent acquired the land during the coverture of the marriage with his sole resources, and

it is also beyond controversy that the land was cleared and planted with rubber by the joint efforts of both the applicant and the second respondent. In such circumstances the presumption is that the property is *harta sapencharian*. What evidence was led to show the contrary? That can only be gauged from the second respondent's evidence adduced before the collector and a summary of his evidence disclosed that he did not allow the applicant to work on the land because he said that the custom in the kampong was that womenfolk do not work, meaning other than household duties. He further said that he disallowed the applicant to work on account of his love and affection for her. That, to my mind, is not sufficient evidence to rebut the presumption. It therefore follows that in the absence of evidence to the contrary the said land is *harta sapencharian*, and relying on established principles the applicant is entitled to a half share in it. I think the present case is not dissimilar to the facts found in *Habsah bte. Mat v. Abdullah bin Jasoh*.⁽³⁾

Where upon the face of the record it appears that the order of the commissioner is wrong in law *certiorari* is available to quash it on the ground of error of law. I need only cite the leading case of *Rex v. Northumberland Compensation Appeal Tribunal, ex parte Shaw*.⁽⁴⁾ In that case the applicant Shaw lost his employment as clerk to the West Northumberland Joint Hospital Board by the passing of the National Service Act, 1946. Aggrieved by the amount of compensation awarded to him by the compensating authority, he referred the matter to the tribunal designated by the National Health Service (Transfer of Offices and Compensation) Regulations, 1948. It became the duty of the tribunal to consider the matter so referred "in accordance with the provisions" of the regulations and "to determine accordingly" whether any land, if so, what compensation ought to be "awarded to the claimant". The tribunal therefore were bound by the definition of "service" contained in the regulations. The order of the tribunal set out the period of the applicant's service with the hospital board. It set out the contention of the compensating authority that the compensation payable should be based on that period of service with the hospital board, and the tribunal stated that it agreed that this service was the only service to be taken into account. The decision did not set out the contention of the applicant that the whole of his local government service should be taken into account. The tribunal dismissed the appeal from the decision of the compensating authority. Thereupon the applicant applied to the divisional court for an order of *certiorari* to remove the decision of the tribunal into the King's Bench division that it might be quashed. Before the divisional court it was admitted by counsel for the tribunal that

A there was error on the face of the decision given by the tribunal, but he contended that *certiorari* would lie to such a statutory tribunal only in the case of want or excess of jurisdiction. The divisional court consisting of Lord Goddard C.J., Hilbury and Parker JJ. granted the order for *certiorari*. For present consideration it is sufficient if I quote a passage from the judgment of Lord Goddard: ⁽⁵⁾

C "What is the result of that? The result clearly seems to me to be that a court before whom the order in the present case is brought can examine it. The tribunal have told us what they have taken into account, what they have disregarded, and the contentions which they accepted. They have told us their view of the law, and we are of opinion that the construction which they placed on this very complicated set of regulations was wrong."

D The tribunal appealed to the Court of Appeal. Counsel for the tribunal made the same submission that an order of *certiorari* could only be granted in respect of a decision of a tribunal on the ground of want or excess of jurisdiction. Singleton L.J. found himself in complete agreement with the reasoning of Lord Goddard as being "as clear and as forcible as any judgment could be." After dealing exhaustively with the relevant judicial exegesis notably *Walsall Overseers v. London and North Western Railway Co.*⁽⁶⁾ and the Privy Council case of *Rex v. Nat Bell Liquors Ltd.*⁽⁷⁾ the Lord Justice said at p. 343:

E "Thus it appears to me that in a case such as the one before this court *certiorari* will lie if there be error on the face of the proceedings."

F The applicability of *certiorari* in this court is not dissimilar to that exercisable by the Courts of Queen's Bench in the United Kingdom. It is within the inherent jurisdiction of the court to control all inferior tribunals, not in an appellate capacity, but in a supervisory capacity. The control extends not only to seeing that the inferior tribunals keep within their jurisdiction but also to seeing that they observe the law. The control is exercised by means of a power to quash any determination by the tribunal which, on the face of it, offends against the law. Denning L.J. in the above case traced the history of the writ and (at page 348) he gives a word of caution which I think ought to be re-stated in the light of the emergence of many new statutory bodies in this country.

I "Of recent years the scope of *certiorari* seems to have been somewhat forgotten. It has been supposed to be confined to the correction of excess of jurisdiction, and not to extend to the correction of errors of law; and several judges have said as much. But the Lord Chief Justice has, in the present case, restored *certiorari* to its rightful position and shown that it can be used to correct errors of law which appear on the face of the record, even though they do not go to jurisdiction. I have looked into the history of the matter, and find that the old cases fully support all that the Lord Chief Justice said. Until about 100 years ago, *certiorari* was regularly used to correct errors of law on the face of the record.

It is only within the last century that it has fallen into disuse, and that is only because there has, until recently, been little occasion for its exercise. Now, with the advent of many new tribunals, and the plain need for supervision over them, recourse must once again be had to this well-tried means of control."

The Lord Justice concluded his judgment by saying that:

"There are, however, many cases in the books where *certiorari* was used to correct errors of law on the face of the record. A striking instance was where the commissioners of sewers imposed an excessive fine, and it was quashed by the Court of King's Bench on the ground that in law their fines ought to be reasonable. Other instances are the numerous cases where *certiorari* was used to determine the validity of a sewer's rate imposed by the commissioners of sewers. There are several cases where an auditor's certificate has been quashed for error of law on the face of it. And I have no doubt that many more instances could be found throughout the books."

Morris L.J., another member of the court, agreed "that an order of *certiorari* will go to the respondent tribunal does not admit of doubt." At page 356 the Lord Justice said:

"The speeches in the House of Lords in *Walsall Overseers v. London and North Western Railway Co.*, *supra*, demonstrated that if that which was stated upon the face of an order of an inferior court showed that the order was erroneous in law, then the order could be removed by *certiorari* and its existence could be ended by quashing it."

I am satisfied that there was an error of law on the face of the record because the facts which were fully stated on the record were plainly inconsistent in law with the decision reached. I therefore quash the order of the commissioner and restore the order of the collector.

Order accordingly.

Solicitors: *Wilson & Co.; Dato' Bijaya & Co.*

PUBLIC PROSECUTOR v. SUNDARAVELU

[A.Cr.J. (Raja Azlan Shah J.) August 25, 1966]

[K.L. — Criminal Application No. 10 of 1966]

Criminal Law and Procedure — Appeal — Application to file petition of appeal out of time — Discretion — Substantial justice.

Corrosive and Explosive Substances and Offensive Weapons Ordinance, 1958, s. 6 — Possession of a knife — Lawful purpose — Criminal Procedure Code (Cap. 6), s. 310.

The respondent had been charged with possession of an offensive weapon in a public place otherwise than for a lawful purpose under section 6(1) of the Corrosive and Explosive Substances and Offensive Weapons Ordinance. The learned magistrate acquitted the respondent without calling him for his defence on the ground that the knife was an ordinary kitchen knife, that the prosecution had not proved the absence of a lawful purpose and that no dangerous situation existed at the time of the arrest and there was therefore reasonable doubt as to whether the respondent kept the knife for an unlawful purpose. Notice of appeal had been filed by the public prosecutor but there was a delay in filing the petition

A of appeal as the petition was sent to the officer-in-charge of police district Kuala Selangor instead of to the court. The public prosecutor applied for leave to file the petition out of time.

Held: (1) this was a proper case in which the court would exercise its discretion and allow the application so that substantial justice may be done;

B (2) in view of its size and shape the knife in this case was undoubtedly a lethal weapon and by virtue of subsection (2) of section 6 of the Corrosive and Explosive Substances and Offensive Weapons Ordinance, it was for the defence to negative any unlawful purpose;

(3) in this case the acquittal must be set aside and an order made that the magistrate should call on the respondent for his defence.

C Cases referred to:—

(1) *Veerasingam v. Public Prosecutor* [1958] M.L.J. 76.

(2) *Abdul Manap v. Public Prosecutor* [1952] M.L.J. 140.

CRIMINAL APPLICATION.

D *Ajaib Singh* (Deputy Public Prosecutor) for the appellant.

Lall Singh Muker for the respondent.

E Raja Azlan Shah J. (delivering oral judgment): This is an application by the deputy public prosecutor by way of motion to file the petition of appeal out of time. The circumstances leading to this application are as follows:

The respondent was charged in the magistrate's court at Kuala Selangor with an offence punishable under section 6(1) of the Corrosive and Explosive Substances and Offensive Weapons Ordinance, 1958. The case eventually came before the learned magistrate at Kuala Selangor. He heard evidence for the prosecution and at the end of the case he acquitted and discharged the respondent without calling for the defence. On March 29, 1966 a notice of appeal was filed by the deputy public prosecutor against that decision, and I may say that the notice was filed in good time. On June 27, 1966 the notes of evidence and grounds of judgment of the learned magistrate were received by the learned deputy public prosecutor, and on July 5, 1966 the learned deputy posted his petition of appeal to the Officer in Charge of Police District, Kuala Selangor. The latter delivered it to the magistrate's court on July 9, 1966, i.e. a slight delay of two days.

This application brings into review the provisions of section 310 of the Criminal Procedure Code (Cap. 6). It is clear from the provisions of that section that this court has a discretion whether or not to allow the application, but to my mind emphasis is laid on the phrase "in order that substantial justice may be done in the matter." I think the provisions of this section have been well gone into by the Court of Appeal in *Veerasingam's* case.⁽¹⁾ There it was said that the section is one of discretion and no hard and fast rules can be laid down, otherwise it